Supreme Court, U. S.
FILED
JUL 24 1979
MICHAEL RODAK, JR., CLERK

No. 79-116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

HALLEY I. THOMAS,

Petitioner,

v.

WASHINGTON GAS LIGHT COMPANY

And

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LEE C. ASHCRAFT
JOSEPH H. KOONZ, JR.
JAMES A. MANNINO
JAMES F. GREEN

2101 L St., N.W., Suite 303
Washington, D.C. 20037

Attorneys for Petitioner

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

INDEX

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 5

I. The Failure of the Fourth Circuit to Faithfully Adhere to the Directives Established by this Court in *Industrial Commission of Wisconsin v. McCartin*, 330 U.S. 622 (1947), Constitutes Compelling Justification for Granting the Petition 6

II. The Confusion and Conflict Among the States and Judicial Circuits Created by the Decision Below Constitutes Compelling Justification for Granting the Petition 13

CONCLUSION 17

Appendix A 1a

Appendix B 3a

Appendix C 9a

Appendix D 16a

Appendix E 20a

Appendix F 34a

CITATIONS

Cases: Page

Carroll v. Lanza,
349 U.S. 408 (1955) 9

Cook v. Minneapolis Bridge Const. Co.,
231 Minn. 433, 43 N.W. 2d 792 (1950) 13

Cox v. American Store Corp.,
283 F.Supp. 390 (D.Md. 1968) 15

Della Vecchia v. World Scope Publishing Co.,
64 N.J. Super. 333, 165 A.2d 872 (1960) 8

Director, Office of Workers' Compensation Programs v. Boughman,
545 F.2d 210 (D.C. Cir. 1976) 13

Ekar v. Int'l Union of Operating Engineers,
1 BRBS 406 (1975) 13

Gasch v. Britton,
202 F.2d 356 (D.C. Cir. 1953) 13

Griffin v. Universal Underwriters Insurance Co.,
283 So. 2d 748 (La. 1973), *cert. denied,*
416 U.S. 904 (1974) 12

Harrison Co. v. Norton,
244 Miss. 752, 146 So.2d 327 (1962) 13

Industrial Commissionof Wisconsin v. McCartin,
330 U.S. 622 (1947) ..... *passim*

Industrial Track Builders of America v. Lemaster,
429 S.W.2d 403 (Ky. 1968) 8, 13

Jordan v. Industrial Commission,
117 Ariz. 215, 571 P.2d 712 (1977) 12

Magnolia Petroleum Co. v. Hunt,
320 U.S. 430 (1943) ..... *passim*

Newport News Shipbuilding & Dry Dock Co. v. Director, Office of Workers' Compensation Programs,
583 F.2d 1273 (4th Cir. 1978) 14

Pettus v. American Airlines, Inc.,
587 F.2d 627 (4th Cir. 1978) ..... *passim*

Ryder v. Insurance Company of North America,
282 So.2d 771 (La. App. 1973) 13

Sade v. Northern Natural Gas Co.,
458 F.2d 210 (10th Cir. 1972) 14

Sharp v. Liberty Mutual Ins. Co.,
463 F.Supp. 104 (D.Md. 1978) 15

Spietz v. Industrial Commission,
251 Wis. 168, 28 N.W.2d 354 (1947) 10

Stanley v. Hinchcliffe and Kenner,
395 Mich. 645, 238 N.W.2d 13 (1976) 13

Texas Employers' Insurance Association v. Miller,
370 S.W.2d 12 (Tex. Civ. App. 1963) 8

Wood v. Aetna Casualty & Surety Company,
260 Md. 651, 273 A.2d 125 (1971) 13, 14

Constitutional and Statutory Provisions:

District of Columbia Workers' Compensation Act,
as amended, 36 D.C. Code § 501 (1973) 4

Longshoremen's and Harbor Workers' Compensation Act,
as amended, 33 U.S.C. § 901-50
(1970 & Supp. V. 1975) 4

United States Constitution,
art. IV, § 1 2

Code of Virginia
Va. Code, § 65.1-40 (1975 Repl. Vol.) 2, 10

Va. Code, § 65.1-61 (1975 Repl. Vol.) 3, 11

Miscellaneous:

A. Larson, *The Law of Workmen's Compensation*, Vol. 4, § 85.10 (1979) 16

A. Larson, *The Law of Workmen's Compensation*, Vol. 4, § 85.30 (1979) 12

A. Larson, *The Law of Workmen's Compensation*, § 85.40 (1979) 12

A. Larson, *The Law of Workmen's Compensation*, Vol. 4, § 85.50 (1979) 8

Restatement of Conflict of Laws, § 403 (1934) 13

Restatement (Second) of Conflict of Laws, § 182 (1971) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

HALLEY I. THOMAS,

Petitioner,

v.

WASHINGTON GAS LIGHT COMPANY

And

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The claimant, Halley I. Thomas, petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Fourth Circuit, (App. A., *infra*), is unreported. The final decision of the Benefits Review Board, (App. B., *infra*), is reported at 9 BRBS 760 (1978). The initial decision

of the Benefits Review Board, (App. D. *infra*), and the decisions of the Administrative Law Judge, (App. C., E., & F., *infra*), are also unreported.

JURISDICTION

The decision of the Court of Appeals was made and entered on April 27, 1979. The petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(i).

QUESTION PRESENTED

Whether the constitutional obligation to give full faith and credit to the Virginia Workmen's Compensation Act, including its exclusive remedy provision, Va. Code § 65.1-40 (1975 Repl. Vol.), precluded an award of compensation benefits by the District of Columbia following approval by the Industrial Commission of Virginia of a voluntary workmen's compensation agreement.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article IV, § 1 of the United States Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and, judicial Proceedings of every other State.

The Virginia Workmen's Compensation Act is embodied in Title 65.1 of the Virginia Code. VA. Code, § 65.1-40 (1975 Repl. Vol.), states:

> §65.1-40. Employee's rights under Act exclude all others. — The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of

> such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death. (Code 1950, § 65-37, 1968, c. 660)

Va. Code, § 65.1-61 (1975 Repl. Vol.) declares:

> § 65.1-61. Foreign injuries. — When an accident happens while the employee is employed elsewhere than in this State which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if:
>
> (1) The contract of employment was made in this State;
>
> (2) The employer's place of business is in this State; and
>
> (3) The residence of the employee is in this State;
>
> Provided the contract of employment was not expressly for service exclusively outside of the State.
>
> But if an employee shall receive compensation or damages under the laws of any other state, nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this Act. (Code 1950, 65-58, 1968, c.660.)

STATEMENT OF THE CASE

Halley I. Thomas, a resident of the District of Columbia since 1949, was hired in 1970 as a heavy laborer by the Washington Gas Light Company (WGL) at their employment office in Washington, D.C. WGL's home office is also located in the District of Columbia. Although Mr. Thomas occasionally worked in the neighboring jurisdic-

tions of Virginia and Maryland, approximately 60% of his duties were performed in the District. For his endeavors, Mr. Thomas received a pay check drawn upon a District of Columbia bank.

On January 22, 1971, Mr. Thomas was breaking concrete with an air hammer in Arlington, Virginia when he sustained a disabling injury to his back. Since that date, Mr. Thomas has been unable to return to his occupation.

Prior to his being represented by counsel, Mr. Thomas agreed to accept temporary total disability benefits under the Virginia Workmen's Compensation Act on February 5, 1971, fourteen days after his injury. The Industrial Commission of Virginia subsequently approved the agreement on March 15, 1971. Mr. Thomas received the Virginia benefits until they reached the maximum amount payable under Virginia law. Mr. Thomas is currently without any compensation disability payment and medical coverage.

On September 24, 1974, Mr. Thomas notified the Deputy Commissioner of the Office of Workers' Compensation Programs (OWCP) of his intention to seek compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, as adopted by the District of Columbia to serve as the District of Columbia Workmen's Compensation Act, 36 D.C. Code § 501-2. Mr. Thomas' claim was initially referred to Administrative Law Judge David Pelkey. Judge Pelkey ruled that the U.S. Constitution's Full Faith and Credit Clause did not make the Virginia benefits *res judicata* to the extent that they barred a claim under the District of Columbia Act. (App. F. p. 44). Subsequently, in a Final Decision and Order dated March 4, 1976, Judge Pelkey awarded Mr. Thomas benefits for permanent total disability beginning as of the date of injury. (App. E., p. 31). WGL's appeal to the Benefits Review Board, U.S. Department of Labor, resulted in a remand for the pur-

pose of taking additional evidence. (App. D., p. 18). After an additional hearing, Judge Pelkey issued a Supplemental Decision and Order on January 21, 1977, reiterating his view that the Full Faith and Credit Clause did not preclude the subsequent award and upholding the permanent total disability benefits. (App. C., p. 13). WGL again appealed to the Board which unanimously affirmed the Administrative Law Judge. (App. B., p. 8).

WGL sought review before the United States Court of Appeals for the Fourth Circuit. On April 27, 1979, in an unpublished per curiam opinion, the Fourth Circuit reversed without argument on the strength of *Pettus v. American Airlines, Inc.*, 587 F.2d 627 (4th Cir. 1978), petition for writ of certiorari pending, No. 78-1739, filed May 18, 1979. (App. A., p. 2).

REASONS FOR GRANTING THE PETITION

Disposition of the present controversy is dependent upon resolution of difficult questions respecting constitutional doctrine, conflict of laws, and principles of *res judicata*. Specifically, this Court is requested to define under what circumstances an employee may receive workmen's compensation benefits from more than one jurisdiction for a single injury without violating constitutional principles of full faith and credit. The establishment and refining of such guidelines requires reconciliation of overlapping statutory provisions of neighboring jurisdictions. Thus, the resolution of the present controversy will shed light on many future questions of state sovereignty within the federal system.

I.

THE FAILURE OF THE FOURTH CIRCUIT TO FAITHFULLY ADHERE TO THE DIRECTIVES ESTABLISHED BY THIS COURT IN *INDUSTRIAL COMMISSION OF WISCONSIN v. McCARTIN*, 330 U.S. 622 (1947), CONSTITUTES COMPELLING JUSTIFICATION FOR GRANTING THE PETITION.

The Lower Court's summary reversal in the instant case was predicated upon the conclusion that Mr. Thomas' claim involved an "identical factual premise and corresponding questions of law" as were posed in *Pettus v. American Airlines*, 587 F.2d 627 (4th Cir. 1978), petition for writ of certiorari, No. 78-1739, filed May 18, 1979. The Fourth Circuit had determined that recovery by the employee, George Pettus, of compensation benefits pursuant to an award by the Industrial Commission of Virginia barred recovery of benefits from the District of Columbia. The majority held that the effect to be accorded the Virginia exclusive remedy provision, a provision similar to that contained in most other state acts, was dictated by *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, (1943). There, this Court reviewed the claim of an oil field worker who received a compensation award in Louisiana after having previously received compensation from the State of Texas. The employee appeared *pro se* to defend against the employer's contention that the Full Faith and Credit Clause made the Texas award exclusive of any extrajurisdictional recovery. In a 5-4 decision, this Court concluded that the Texas exclusive remedy provision foreclosed any claim under the Louisiana statute.

While relying on *Magnolia*, the Fourth Circuit dismissed the relevance of *Industrial Commission of Wisconsin v. McCartin*, 330 U.S. 622 (1947). In *McCartin*, an employee residing in Illinois was injured while working in Wisconsin. The employee and his employer reached an agreement providing for compensation to be paid under the Illinois statute and in settlement of all claims thereunder. Subsequently, the workman filed a claim for compensation benefits in Wisconsin. The employer defended against the second award by arguing that, according to the rule in *Magnolia*, the Illinois provision making workmen's compensation the employee's exclusive remedy barred the Wisconsin award. However, the unanimous panel concluded that the Illinois benefits were final and conclusive only within that jurisdiction and were not intended to inhibit extrajurisdictional remedies. The Court announced the rule by which all future controversies were to be measured and judged when it stated:

> ". . . there is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, that it is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment [citations omitted]. And in light of the rule that workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted (citations omitted), we should not readily interpret such a statute to cut off an employee's right to sue under other legislation passed for his benefit. *Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction.*" 330 U.S. at 627-8.

The decision below mischaracterizes and violates this Court's previous decisions in *Magnolia* and *McCartin* in four critical respects. The first two concern the nature and effect of the award itself while the latter two concern the construction given the Virginia statute. This Court should grant the petition in order to rectify this unfortunate decision and define clearly the guidelines for resolving this constitutional question.

The initial aspect which sets the present case apart from both *Pettus* and *Magnolia* is the means by which the

benefits were secured. In *Pettus* and *Magnolia,* the original compensation was paid pursuant to a compensation award. The amount and duration of the benefits were determined subsequent to the filing of a claim and an adjudicatory hearing. In contrast, Mr. Thomas' right to compensation was settled by a voluntary agreement only subsequently rubber stamped by the Industrial Commission of Virginia.

In such a case, the compulsion to give full faith and credit to the "award" is considerably weakened. The nature and effect of a voluntary agreement entered into by private parties is undoubtedly less final and conclusive than an award issued pursuant to an adversarial proceeding. *Industrial Track Builders of America v. Lemaster,* 429 S.W.2d 403 (Ky. 1968); *Texas Employers' Insurance Association v. Miller,* 370 S.W.2d 12 (Tex. Civ. App. 1963); *Della Vecchia v. World Scope Publishing Company,* 64 N.J. Super 333, 165 A.2d 872 (1960). As Professor Arthur Larson, the preeminent authority in compensation law, surmises in his treatise, *The Law of Workmen's Compensation,* Vol. 4, § 85.50 (1979):

> "Several cases, both before and after *McCartin,* have held that a prior voluntary payment of compensation accepted by the employee under the laws of one state does not detract from the employee's statutory right to an award in another state whether the agreement for compensation received commission approval or not."

Although the Fourth Circuit failed to discern the unique nature and quality of the award, this Court has itself recognized the importance of the means used to secure the benefits. In *McCartin,* the Illinois benefits were the result of an almost identical voluntary agreement approved by the Illinois Industrial Commission. The Court therefore held that:

> ". . . . since the Texas award had the degree of finality contemplated by the full faith and credit clause, it was held that Louisiana was constitutionally forbidden from entering a subsequent award under its statute. But we do not believe that the same situation exists in this case, the Illinois award being different in its nature and effect from the Texas award in the *Magnolia* case." 330 U.S. at 621-2.

Again, in *Carroll v. Lanza,* 349 U.S. 408 (1955), the issue arose when an employee pursued a claim under the Arkansas Compensation Act after receiving 34 weekly payments under the Missouri law. The Missouri exclusive remedy provision was indistinguishable from the Virginia statute in that it excluded "all other rights and remedies . . . *at common law or otherwise.*" 349 U.S. at 409. The benefits under the Missouri Compensation Act had been paid voluntarily by the employer. Mr. Justice Douglas wrote for the Court:

> "The Court of Appeals thought *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430, to be controlling. There the employee received a *final award* for compensation in the forum of the injury returned to his home State and sued to recover under its Compensation Act. We held that the latter suit was precluded by the Full Faith and Credit Clause. But here there was no final award under the Missouri Act. Under that Act the statutory payments apparently start automatically on receipt of notice of the injury [citation omitted]. While provision is made for an adjudication of disputes between an employee and his employer [citation omitted], no adjudication was sought or obtained here." 349 U.S. at 410-11. (Emphasis supplied by the Court).

The second major element of the present case which militates against the application of *Magnolia* is the indefinite nature of the Virignia award itself. Mr. Thomas only received Virginia Compensation benefits for *temporary* total disability. Thus, the Virginia Industrial Commission retained continuing jurisdiction over the claim to either award permanent disability benefits or to finally dispose of the case. Therefore at the time the claim was filed in the District of Columbia, there had been no final and conclusive disposition of Mr. Thomas' claim. Mr. Thomas was subsequently awarded permanent total disability benefits by the District of Columbia. In his Interlocutory Decision and Order the Administrative Law Judge adopted the rule of *Spietz v. Industrial Commission*, 251 Wis. 168, 28 N.W.2d 354 (1947), holding that the requisite finality is not established by an award for temporary disability. The Petitioner urges that this Court consider the question ignored by the Fourth Circuit, i.e. whether an agreement for indefinite temporary disability benefits precludes an award in another jurisdiction for permanent and total disability.

Thirdly, the Fourth Circuit has misapplied the *Magnolia-McCartin* precedent in its analysis of the language and intent of the Virginia exclusive remedy provision. The Virginia Workmen's Compensation Act does not contain the "unmistakable language" expressly prohibiting supplementation of a Virginia award by another jurisdiction as required by *McCartin*. The Virginia exclusive remedy provision, Va. Code § 65.1-40, states that "the rights and remedies herein granted . . . shall exclude all other rights and remedies of such employee . . . *at common law or otherwise* . . ." The provision strikingly parallels the Illinois statute of *McCartin* which provided that "No *common law or statutory right* . . . other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this Act . . ." 330 U.S. at 627. The *McCartin* decision held that the

clear object of this common provision is merely to substitute the right to compensation for any remedial steps against an employer which the jurisdiction previously recognized. Thus, in the absence of an express provision to the contrary, the sole effect of the section is to exclude any alternative remedies *within that jurisdiction*.

Fourth and finally, the Lower Court has extended the scope of the *Magnolia* decision far beyond its well defined limits. The Texas Act was unusual in that it had been judicially construed to provide that "a compensation award may not be had in Texas if the employee has claimed and received compensation for his injury under the laws of another state." 330 U.S. at 435. Obviously, this was not the problem before the Court, but its reverse. The Court, however, inductively reasoned that the Texas legislature must have also intended through its exclusive remedy provision for an award in Texas to prevent a subsequent award elsewhere. However, the majority expressly limited the scope of its decision to this peculiar situation. Mr. Chief Justice Stone stated unequivocally: "We have no occasion to consider what effect would be required to be given to the Texas award if the Texas courts held that an award of compensation in another state would not bar an award in Texas . . ." 320 U.S. at 443.

The Virginia statute presents the exact question upon which the *Magnolia* majority reserved judgment. Virginia specifically provides that compensation *may* be granted under the Virginia Act despite a prior award by another jurisdiction. Va. Code § 65.1-61 (1975 Repl. Vol.). Ultimately then, the Fourth Circuit, has by their own initiative, extended *Magnolia* in a manner expressly forbidden by the majority opinion. Moreover, application of the *Magnolia* rationale to the instant controversy is as supportive of the second award as *McCartin*. The exact chain of reasoning central to this Court's decision in

Magnolia that a successive award was *precluded* by the Texas Act, compels the conclusion that a second award is *permitted* by the Virginia Act. Therefore, the preservation of this Court's mandates in both *Magnolia* and *McCartin* requires a result contrary to the Fourth Circuit's decision.

II.

THE CONFUSION AND CONFLICT AMONG THE STATES AND JUDICIAL CIRCUITS CREATED BY THE DECISION BELOW CONSTITUTES COMPELLING JUSTIFICATION FOR GRANTING THE PETITION.

The decision below is in direct conflict with the overwhelming weight of authority. Although *McCartin* did not expressly override *Magnolia,* it has been widely interpreted as sanctioning a successive award in the absence of an express statutory prohibition to the contrary. A Larson, *The Law Of Workmen's Compensation,* Vol 4, § 85.40 (1970). In view of the number of states whose compensation statutes lack such an express prohibition, the decision pre-empts the applicability of *Magnolia* in nearly every jurisdiction.[1] Not surprisingly, the Fourth Circuit's construction of *Magnolia* and *McCartin* is in express conflict with the position of most state courts. *Jordan v. Industrial Commission,* 117 Ariz. 215, 571 P.2d 712 (1977);

[1]Prof. Larson notes in his treatise that in light of the lack of such an express prohibition in Texas, the *Magnolia* doctrine may not even apply to the statute it originally governed. A. Larson, *The Law of Workmen's Compensation,* Vol. 4, § 85.30 (1979). See *Griffin v. Universal Underwriters Ins. Co.,* 283 So.2d 748 (La. 1973), *cert. denied,* 416 U.S. 904 (1974).

Stanley v. Hinchcliffe and Kenner, 395 Mich. 645, 238 N.W. 2d 13 (1976); *Ryder v. Insurance Company of North America,* 282 So.2d 771 (La. App. 1973); *Wood v. Aetna Casualty & Surety Company,* 260 Md. 651, 273 A.2d 125 (1971); *Industrial Track Builders of America v. Lemaster,* 429 S.W.2d 403 (Ky. 1968); *Harrison Company v. Norton,* 244 Miss. 752, 146 So.2d 327 (1962); *Cook v. Minneapolis Bridge Construction Co.,* 231 Minn. 433, 43 N.W.2d 792 (1950). See also *Restatement of Conflict of Laws,* § 403 (1934); *Restatement (Second) of Conflict of Laws,* § 182 (1971).

More importantly, the Fourth Circuit's decision reflects a construction of this Court's rulings directly at odds with other judicial circuits. In *Director, Office of Workers' Compensation Programs v. Boughman,* 545 F.2d 210 (D.C. Cir. 1976), the District of Columbia Circuit upheld an award under the D.C. Act subsequent to a similar award in California. The Court summarily rejected the view that the Full Faith and Credit Clause was any barrier to the second award. The unanimous panel embraced the interpretation of *McCartin* adopted by the Benefits Review Board, a statutorily created administrative appellate tribunal. The Board, in its disposition of the *Boughman* case had stated that "[i]n situations where the workmen's compensation law of a state does not contain an explicit prohibition against seeking additional or alternative relief under the laws of another jurisdiction, the Supreme Court has sanctioned the granting of successive awards, subject to crediting the liable party with amounts paid pursuant to the initial award." *Ekar v. Int'l Union of Operating Engineers,* 1 BRBS 406, at 419 (1975). Since the California and Virginia statutes have similar provisions, the diverse applications of the *Magnolia-McCartin* precedent can only foster chaos in the future.[2]

[2]Curiously, the Fourth Circuit did not mention *Boughman* in its *Pettus* decision. The majority instead relied on *Gasch v. Britton,* 202

The decision below is also contrary to the position taken by the Tenth Circuit in *Sade v. Northern Natural Gas Co.*, 458 F.2d 210 (10th Cir. 1972). A central issue before the Court was whether the plaintiff's recovery under the Oklahoma Workmen's Compensation Law barred a common law action in Kansas. The Oklahoma Act, like the Texas Act in *Magnolia*, provided that a previous recovery from another jurisdiction precluded an award in Oklahoma. Nonetheless, the Tenth Circuit's interpretation of *McCartin* was summarized by the statement that:

> "There is no provision in the Oklahoma law, however, which specifically purports to preclude one who has recovered under Oklahoma law from thereafter pursuing any additional remedies he may have under the laws of the state where the injury occurred. Moreover, under *Industrial Commission v. McCartin*, [citation omitted] such could be accomplished only by "unmistakeable language", which language is not to be found in Oklahoma law." 458 F.2d at 215.

The decisions in *Pettus* and the instant case are also in conflict with the Fourth Circuit's own decision in *Newport News Shipbuilding and Dry Dock Company v. Director, Office of Workers' Compensation Programs*, 583 F.2d 1273 (4th Cir. 1978). Although the majority in Pettus attempted to distinguish the case by noting that the Virginia Commission did not have jurisdiction in *Newport News*,

F.2d 356 (D.C. Cir. 1953) which held that the Maryland exclusive remedy provision precluded a subsequent award in the District of Columbia. However, the case is of extremely questionable precedential authority. The *Gasch* decision was predicated entirely upon implying from a Maryland Court of Appeals decision that the statute's exclusive remedy section was an express prohibition of successive awards. Subsequently, in *Wood v. Aetna Casualty Company*, 260 Md. 651, 273 A.2d 125 (1971), the Maryland Court of Appeals denied any intention to so hold and therefore upheld the right of a claimant to obtain an extrajurisdictional award subsequent to a Maryland award.

the distinction, even if valid, does not reconcile the statement by the Court that:

> "[E]ven assuming that under the reasoning of *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943), the adjudication of a state compensation claim could in some circumstances bar later proceedings under the Federal Act, it is obvious, especially from our discussion of the "exclusivity" provision of the Virginia statute, that the reasoning of *Industrial Commission v. McCartin*, 330 U.S. 622 (1947), not *Magnolia*, is controlling in this case and that no valid 'full faith and credit' issue is raised by the federal award." 583 F.2d at 1278.

In assessing the consequences of this confusion, it should be noted that the context in which this issue has arisen is not an isolated one. It is not uncommon for a multiplicity of states to possess jurisdiction to award compensation for a single injury. For example, due to the geographical proximity of three jurisdictions in the Washington, D.C. Metropolitan Area, workmen in that area often pursue compensation claims in more than one jurisdiction.[3] Nor is the impact limited to select localized areas. Employment injuries which are potentially compensable under more than one statute are surprisingly commonplace. As Professor Larson observes:

> "Tangles of this sort, which almost sound as if they had been invented for an examination ques-

[3]Due to the regularity with which District of Columbia employees are injured outside the District of Columbia, many local unions have negotiated "excess benefits" provisions in their collective bargaining agreements which require the employer to pay the injured workman the difference between the benefits provided by the jurisdiction in *which the injury occurred and the higher D.C. benefits. See Sharp v. Liberty Mutual Ins. Co.*, 463 F.Supp. 104 (D. Md. 1978); *Cox v. American Store Corp.*, 283 F.Supp. 390 (D.Md. 1968).

tion in *Conflict of Laws,* are by no means unusual, what with truck, bus and airlines, construction companies, and many other industries operating on a nationwide or even worldwide basis, drawing their employees from many states, contracting with them at the home office or at branch headquarters, and sending them to work in different states and countries, often after trying to contrive a private contract that will ensure the applicability of a single named compensation act." A. Larson, *The Law of Workmen's Compensation,* Vol 4, § 85.10 (1979).

CONCLUSION

The instant case provides an opportunity to answer nagging constitutional questions which have surfaced and resurfaced since the *McCartin* decision in 1947. Initially, the disposition of the case at bar will substantially define the degree of finality in nature and effect required of compensation awards for purposes of the Full Faith and Credit Clause. Moreover, the decision will ultimately remove the lingering *Magnolia-McCartin* controversy, revived by the decision below, respecting the proper construction of compensation act exclusivity provisions. The Petitioner urges, that in resolving these issues, the Fourth Circuit overextended the scope of *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430 (1943) and inadvertently wandered from the clear directions provided by *Industrial Commission of Wisconsin v. McCartin,* 330 U.S. 622 (1947). In order to restore and preserve the vitality of this Court's mandates and to quiet the confusion engendered by the decision below, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LEE C. ASHCRAFT
JOSEPH H. KOONZ, JR.
JAMES A. MANNINO
JAMES F. GREEN

2101 L Street, N.W., Suite 303
Washington, D.C. 20037

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1261

WASHINGTON GAS LIGHT COMPANY,
Self-Insured Employer,
Petitioner,

v.

HALLEY I. THOMAS,
Respondent.

Submitted January 18, 1979 — Decided April 27, 1979

On Petition for Review of an Order of the
Benefits Review Board of the United States
Department of Labor

Before BRYAN, Senior Circuit Judge,
WIDENER and HALL, Circuit Judges.

Lewis Carroll, Carl W. Belcher, Douglas V. Pope,
on brief for Petitioner; Lee C. Ashcraft,
Joseph H. Koonz, Jr., James A. Mannino,
James F. Green, on brief for Respondent.

PER CURIAM:

This is a petition by the Washington Gas Light Company (WGLC) to review an order of the Benefits Review Board (BRB) of the United States Department of Labor, awarding Halley I. Thomas compensation benefits in 1974, under the Longshoremen's and Harbor Workers Act, 33 U.S.C. § 902 *et. seq.* (1970 & 1978), as made applicable to the District of Columbia, D.C. Code Ann. § 36-501 (1973 & Supp. IV 1977), after he had sought and obtained an award from the Industrial Commission of Virginia in 1971, under the State's Compensation Act, Va. Code § 65.1-1 *et seq.* (1973 Repl. Vol.). WGLC appeals, moving for a final judgment of reversal, and we grant the motion.

Upon an identical factual premise and corresponding questions of law, we set aside a similar order of the BRB in Pettus v. American Airlines, Inc., 587 F2d 627 (4th Cir. 1978). Consequently, we perceive no reason to hear argument on the appeal.

Reversed.

APPENDIX B

U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

HALLEY I. THOMAS	)	
Claimant-Respondent	)	
v.	)	Benefits Review Board
WASHINGTON GAS LIGHT COMPANY	)	BRB No. 77-182
Self - Insured Employer	)	DECISION
Petitioner	)	

Appeal from the Decision and Order and Supplemental Decision and Order of David W. Pelkey, Administrative Law Judge, United States Department of Labor.

James F. Green (Ashcraft, Gerel & Koonz), Washington, D.C., for the claimant.

Carl W. Belcher, Washington, D.C., for the self-insured employer.

Before: SMITH, Chairman, and MILLER, Member.

MILLER, Member:

This is an appeal by the employer from a Decision and Order and Supplemental Decision and Order (76-DCWC-4) of Administrative Law Judge David W.

Pelkey, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §*501 et seq.* (hereinafter referred to as the Act).

On January 22, 1971, the claimant, Halley I. Thomas, was injured in the course of his employment in Arlington, Virginia. Pursuant to an agreement entered into by the parties and approved by the Virginia Industrial Commission, claimant has been receiving temporary total disability benefits from the date of injury except for the brief period between December 27, 1971, and January 3, 1972, when he performed clerical work for the employer.

Claimant notified the deputy commissioner of his intention to pursue a claim for benefits pursuant to the District of Columbia Workmen's Compensation Act on September 24, 1974.

In a preliminary hearing before Administrative Law Judge Pelkey, the employer acknowledged that, but for the Virginia award, the claim would be cognizable under District law. He argued, however, that the Virginia award was res judicata and that a subsequent award under District law would violate the Full Faith and Credit Clause of the United States Constitution. U.S. Const. Art. 4, § 1. The administrative law judge rejected this argument and in an Interlocutory Decision and Order dated September 24, 1975, concluded that the claim was within the jurisdiction of the District of Columbia. Subsequently, in a final Decision and Order, the administrative law judge awarded claimant benefits for permanent total disability from January 22, 1971, an additional ten percent compensation under Section 14(e) of the Act, 33 U.S.C. § 914(e), interest, and an attorney's fee.

Both the claimant and the employer appealed. The employer contended that the Virginia award was entitled to full faith and credit in the District of Columbia;

that Mr. Thomas' claim under the Act was time-barred; and that the imposition of the Section 14(e) "penalty" was not in accordance with law. Claimant contended the amount of the attorney's fee awarded was inadequate.

Following oral argument, the Board granted a motion by the employer to remand the case for the admission and consideration of certain documents bearing on the issues of timeliness and an assessment under Section 14(e). *Thomas v. Washington Gas Light Co.*, ____ BRBS BRB No. 76-180 & 76-180A (Oct. 20, 1976).

In a hearing pursuant to the remand, the administrative law judge determined that the claim was timely filed and computed the amount of additional compensation owing under Section 14(e) of the Act.

The employer appeals raising the same three issues previously before the Board. It also contends that the ad ministrative law judge erroneously failed to consider Section 12 of the Act.

As a preliminary matter, the claimant argues that since the Board's previous decision to remand did not direct consideration of whether the Virginia award is entitled to full faith and credit, the employer is foreclosed from raising this issue in the present appeal. We find claimant's argument is without merit. The Board remanded the case to "complete the record" since, as we pointed out, "the unsatisfactory state of the record . . . precludes the thorough consideration of the issues on appeal which the parties deserve." The record is now complete and we accordingly proceed to consider the merits of the issues raised.

Employer contends that the agreement approved by the Virginia Industrial Commission is the claimant's exclusive remedy under Virginia law and that this agreement is therefore entitled to full faith and credit in the District of Columbia.

In situations where the workmen's compensation law of a state does not contain an explicit prohibition against seeking additional or alternative relief under the laws of

another jurisdiction, the Supreme Court has sanctioned the granting of successive awards, subject to crediting the liable party with amounts paid pursuant to the initial award. *Industrial Commission of Wisconsin v. McCartin,* 330 U.S. 622 (1947); *see also Director, Office of Workers' Compensation Programs v. Boughman,* 545 F.2d 210 (D.C. Cir. 1976). Each state is prima facie entitled to enforce in its own courts its own lawfully enacted Statutes. *Alaska Meatpackers Association v. Industrial Accident Commission of California,* 294 U.S. 532 (1934) In *Pettus v. American Airlines, Inc.,* 6 BRBS 461, BRB No. 77-115 (Aug. 22, 1977), we specifically held that the Virginia statue contains no explicit prohibition which would preclude recovery injuries under the District of Columbia Act. We therefore conclude that it is proper for the District of Columbia to exercise its concurrent jurisdiction in this case.

The employer also contends that Mr. Thomas' claim is time-barred under Section 13(a) of the Act, 33 U.S.C. §913(a), because his claim was not filed until three years after his injury.

Section 30(f) of the Act, 33 U.S.C. § 930(f), tolls the running of the Section 13(a) statute of limitations when the employer having notice or knowledge of the employee's injury fails to file a report as required by Section 30(a) of the act. 33 U.S.C. §930(a). Although the employer does not dispute that it had knowledge of the injury and that it has not yet filed the report required by Section 30(a), it argues that a similar report was filed in Virginia which should be construed as compliance with the Act.

We cannot accept this argument. Regardless of whether the requirements under the Virginia Act are similar to those under the District of Columbia Act, the Board has consistently held that the statute of limitations is tolled by Section 30(f) unless the employer complies with Section 30(a). *Riley v. Eureka Van and Storage Co.,* 1 BRBS 449, BRB No. 74-155 (May 6, 1975). Since no report of injury jury was ever filed under the ACT, we conclude that the

statute of limitations did not begin to run against Mr. Thomas' claim and it is not time-barred.

The employer also contends that it was error for the administrative law judge to assess additional compensation under Section 14(e) of the Act, 33 U.S.C. § 914(e) since the employer made compensation payments pursuant to Virginia law and these payments should be considered full satisfaction for any compensation owed until a claim is filed under the District of Columbia Act. It further argues that the issues it raised in conennection with the employee's claim constitute sufficient compliance with the requirements of Section 14(d) and should operate as a notice of controversion for the period after the filing of the District of Columbia claim.

In *Jones v. Newport News Shipbuilding & Dry Dock Co.,* 5 BRBS 323, BRB No. 76-320 (Jan. 4, 1977) we held that

> Section 14(e) provides for only two exceptions to the requirement of the additional ten percent award: The timely filing of the Notice of Controversion pursuant to Section 14(d) or excuse for nonpayment of compenstion "owing to conditions over which [the employer] had no control."

Jones, supra at 131. Neither the compensation benefits paid pursuant to Virginia law nor issues raised by the employer in connection with the employee's claim are tantamount to filing a Notice of Controversion under Section 14(e) of the Act. Further, the administrative law judge determined that there had been no showing by the employer that, owing to conditions over which he had no control, compensation payments could not have been made. The record clearly supports this conclusion. Since the employer has not brought his case within either of the two exceptions to Section 14(e) set forth in *Jones supra,* we conclude that the award of additional compensation is proper.

The employer's last contention is that it was error for the administrative law judge to fail to consider the ap-

plicability of Section 12 of the Act. 33 U.S.C. § 912. It is argued that the transcript of the August 7, 1975, hearing, the first hearing held before the administrative law judge, shows that the notice requirement under Section 12 was raised as an aspect of the employer's jurisdictional issue. However, it was stipulated at the August 1975 hearing that the only issues in dispute were jurisdiction, nature and extent of disability, whether or not a ten percent penalty, interest and costs should be assessed, and whether the claim was timely. At the end of the hearing, employer did note that it would "submit a brief memorandum of law on the question of jurisdiction, as well as, notice, ten percent penalty. . ." However, this ambiguous statement was not enough to indicate the question of notice under Section 12 was being raised. Moreover, employer did not even mention the notice issue in its post-hearing brief. We can find nothing in the record to indicate that the parties ever changed the issues originally stipulated to include Section 12. In fact, the first and only specific reference to Section 12 is in the employer's brief to the Board in the present appeal. We conclude that Section 12 was not raised before the administrative law judge at the initial or any other stage of the claim and cannot now be raised for the first time on appeal. *Miller* v. *Tacoma Boatbuilding Co.*, _____ BRBS_____ , BRB No. 77-121. (Jan. 23, 1978).

Accordingly, the Decision and Order of the administrative law judge is affirmed.

JULIUS MILLER, Member

I Concur: SAMUEL J. SMITH, Chairman

Dated this 28th day of February, 1978

APPENDIX C

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of:	)	
HALLEY I. THOMAS	)	
Claimant	)	
v.	)	
	)	Case No. 76-DCWC-4
WASHINGTON GAS LIGHT COMPANY	)	OWCP No. 40-89630
Employer	)	
SELF-INSURED	)	
Carrier	)	

SUPPLEMENTAL DECISION AND ORDER

In an October 20, 1976, Decision (BRB No. 76-180, 180A), the Benefits Review Board, attending appeals from this administrative law judge's decisions in a September 24, 1975, Interlocutory Decision and a March 4, 1976, Decision and Order (D&O), remanded this matter with directions to the administrative law judge:

> "xxxx to allow the admission and consideration of relevant documents included in the deputy commissioner's file bearing on the issues of the

claim's timeliness and the Section 30 notice requirement under the Act, 33 U.S.C. § 930, and the assessment of additional compensation pursuant to Section 14(e)."

The March 4 D&O awarded Claimant compensation for permanent total disability in connection with a claim therefor under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, as amended, 36 D.C.C. 501 *et seq.*

In compliance with the mandate of the Benefits Review Board, a hearing was held on January 10, 1977. Neither party tendered testimony at that hearing. However, at and prior to the time of the hearing, the parties introduced the following documents into evidence, representing that they were pertinent and material and stipulating that proper disposition was made of the documents within reasonable times after the dates they bear:

A) a February 5, 1971, memorandum of agreement as to payment of compensation under the Virginia workmen's compensation statute;

B) a March 15, 1971, Virginia Industrial Commission approval of the agreement and award of compensation;

C) a September 24, 1974, document constituting Claimant's claim for compensation under the District of Columbia Workmen's Compensation Act (the Act);

D) an October 2, 1974, notice, from the Department of Labor (DOL) to Employer, that Claimant had filed a claim for compensation under the Act;

E) a November 15, 1974 letter, from Employer to DOL, asserting, *inter alia,* that the claim "should be denied" because Claimant failed to file his claim under the Act within one year after the injury;

F) an April 9, 1975, letter from DOL to Employer that, *inter alia,* recommended that payments be made under the Act;

G) an April 14, 1975, letter in which Employer advised

DOL that its recommendation was rejected and in which Employer submitted that it would continue to pay compensation under the Virginia statute;

H) a May 19, 1975, form constituting another claim by Claimant for compensation under the Act, again for the January 1971 injury;

I) a May 22, 1975, notice, from DOL to Employer, that Claimant had filed a claim for compensation under the Act;

J) a June 10, 1975, letter, with which Employer transmitted its Answer, to the May 1975 claim, to DOL;

K) a June 10, 1975, form constituting Employer's Answer to the May 1975 claim;

L a July 11, 1975, memorandum by which the deputy commissioner referred the claim to Office of Administrative law Judges for a formal hearing; and

M) a January 7, 1977, letter by which DOL transmitted specified documents to Employer.

Pertinent provisions relating to whether the claim was filed in a timely manner and the Section 30 notice requirements are:

A) those in 33 U.S.C. 913(a) that state that, a right to compensation for disability shall be barred unless a claim therefor is filed within one year after the injury;

B) those in 33 U.S.C. 930(a) that state that, within 10 days after an injury, an employer shall send the Secretary of Labor and a deputy commissioner a report containing prescribed information relating to the injury; and

C) those in 33 U.S.C. 930(f) that state that, where an employer, specified agent or carrier has knowledge of an injury and fails, neglects or refuses to file the Sec. 30(a) report, the time limitation in Sec. 13(a) shall not begin to run against the claim, or in favor of the employer or carrier, until the Sec. 30(a) report is furnished.

Pertinent provisions relating to the assessment of additional compensation are those in 33 U.S.C. 914(e), relating to instances where payment of compensation installments is required where there has been no award of compensa-

tion . They prescribe that 10 percent thereof shall be added to each installment not paid within 14 days after it becomes due unless:

A) an employer files a prescribed notice, of controversion of the right to payment, with a deputy commissioner within 14 days after acquisition of knowledge of an alleged injury; or

B) a deputy commisioner (or, after referral to Office of Administrative Law Judges, and administrative law Judge) excuses such non-payment after an employer shows that, owing to conditions over which it had no control, the prescribed payment could not be made.

Findings of Fact

A) Claimant did not file his claim under the Act within one year after the injury.

B) Employer had knowledge of the injury on the day it was sustained by Claimant.

C) Employer did not, within 10 days after claimant's injury, file the report required by 33 U.S.C. 930(a) and yet has not filed the report.

D) Employer did not, on or before 14 days after it acquired knowledge of Claimant's alleged injury, file a notice stating that Claimant's right to compensation was controverted, as required by 33 U.S.C. 914(d), and yet has not filed the notice.

E) Employer made no installment payments of compensation under the Act prior to the March 4, 1976, Decision and Order award compensation under the Act.

F) Employer has tendered no showing that, owing to conditions over which it had no control, it could not make installment payments of compensation without an award.

Conclusions of Law

The claim is not barred because Claimant failed to file it within one year of his injury.

Employer was obligated, without an award, to make the first installment payment of compensation, under the Act, 14 days after Claimant sustained his injury, and to make subsequent payments as required by 33 U.S.C. 914(b) until this administrative law judge awarded compensation under the Act.

Employer's failure to make installment payments of compensation without award is not excused.

Decision

Claimant's claim was filled in a timely manner.

Employer is responsible for payment of the additional compensation required by 33 U.S.C. 914(e).

ORDER

To each installment of compensation that was payable without an award and that was not paid within 14 days after it became due, Employer shall add an amount equal to 10 percent of such installment and pay the sum to Claimant.

David W. Pelkey
Administrative Law Judge

Dated: January 21, 1977
Washington, D.C.

CERTIFICATE OF FILING AND SERVICE

I certify that on January 31, 1977 the foregoing Supplemental Compensation Order was filed in the Office of the Deputy Commissioner, District of Columbia District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mr. Halley I. Thomas, 1508 Howard Road, S.E.,
Washington, D.C. 20020
Claimant

Washington Gas Light Company
1100 "H" Street, NW
Washington, D.C. 20005
Insurance Carrier or Employer (if self-insured)

James F. Green, Esq., Ashcraft, Gerel & Koonz,
2101 L Street, NW, Suite 303
Washington, D.C. 20037.

Paul H. Harrington, Esq., 1100 "H" Street, N.W.,
Washington, D.C. 20005.
1100 "H" Street, N.W.
Washington, D.C. 20005

A copy was also mailed by regular mail to the following:

Judge David W. Pelkey, Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20210

Associate Solicitor of Labor for Employee Benefits, U.S. Department of Labor, Suite N-2716, NDOL, Washington, D.C. 20210.

Director, Office of Workers' Compensation Programs, (LHWCA) U.S. Department of Labor, Washington, D.C. 20211.

JACK GARRELL
Deputy Commissioner
40th Compensation District U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

APPENDIX D

U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

HALLEY I. THOMAS	)	
Claimant-Petitioner Cross-Respondent	)	Filed as Part of the Record
v.	)	Oct. 20 1976
WASHINGTON GAS LIGHT COMPANY	)	Susan Rambo
Employer-Respondent Cross-Petitioner	)	Benefits Review Board BRB Nos. 76-180 and 76-180A
	)	DECISION
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party in Interest	)	

Appeal from the Decision and Order of David W. Pelkey, Administrative law Judge, United States Department of Labor.

James F. Green (Ashcraft, Gerel & Koonz), Washington, D.C., for the claimant.

Carl W. Belcher (Washington Gas Light Company), Washington, D.C., for the employer.

Joshua T. Gillelan, II (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

These appeals are by the claimant and the employer from an Interlocutory Decision and Order (76-DCWC-4), dated September 24, 1975, and a final Decision and Order (76-DCWC-4), dated March 4, 1976, of Administrative Law Judge David W. Pelkey. The claim was filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*,as made applicable to the District of Columbia by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq.* (hereinafter referred to as the Act).

On January 22, 1971, Halley I. Thomas (claimant), a resident of the District of Columbia, was injured in the course of his employment with the Washinton Gas Light Company (employer). The accident occurred in Arlington, Virginia, and claimant has been receiving temporary total disability benefits from the date of injury pursuant to an agreement entered into by the parties and approved by the Virginia Industrial Commission on March 15, 1971.

Claimant notified the deputy commissioner of his intention to pursue a claim for benefits pursuant to the District of Columbia Workmen's Compensation Act in a letter dated September 24, 1974.

Mr. Thomas' claim was referred to the Office of Administrative Law Judges, and a hearing was held to determine whether, under the Constitution's full faith and credit clause, the claimant's compensation award under Virginia law was res judicata to the extent that it precludes a subsequent award of compensation under the District of Columbia Act. In an Interlocutory Decision and Order dated September 24, 1975, the administrative law judge determined that the claim under the D.C. Act was not so barred.

Subsequently, in a final Decision and Order dated March 4, 1976, Judge Pelkey awarded claimant benefits for permanent total disability from January 22, 1971, an additional ten percent compensation under Section 14(e) of the Act, 33 U.S.C. §914(e), interest, and attorney's fee.

The employer appeals contending that the Virginia award is entitled to full faith and credit in the District of Columbia, thus barring the award of benefits under the Act; that Mr. Thomas' claim under the Act is time-barred; and that the imposition of the Section 14(e) "penalty" is not in accordance with law.

Claimant appeals contesting the amount of the attorney's fee awarded by the administrative law judge.

Following oral argument on the issues in these appeals, the employer moved to remand this case for the admission and consideration of certain documents not a part of the record before the Board.

The Board has carefully analyzed the entire record in this case, the briefs of the parties, as well as the Motion to Remand submitted by the employer and the response thereto filed by the claimant. We are of the opinion that the unsatisfactory state of the record before us precludes the thorough consideration of the issues on appeal which the parties deserve. Thus, in order to complete the record, we remand this case to the administrative law judge to allow the admission and consideration of relevant documents included in the deputy commisioner's file bearing on the issues of the claim's timeliness and the Section 30 notice requirement under the Act, 33 U.S.C. §930, and the assessment of additional compensation pursuant to Section 14(e).

Accordingly, we remand this case to the Office of Administrative law Judges for further appropriate action consistent with the opinions expressed herein.

Ruth V. Washington, Chairperson

We concur:

Ralph M. Hartman, Member

Julius Miller, Member

Dated this 20th day of October, 1976.

SERVICE SHEET

BRB Nos. 76-180 and 180A:
HALLEY I. THOMAS
v.
WASHINGTON GAS LIGHT COMPANY

A copy of the attached Decision has been sent to following parties:

James F. Green, Esq. -Certified Mail-
2101 L Street, N.W., Suite 303
Washington, D.C. 20037

Carl Belcher, Esq. -Certified Mail-
1100 H Street, N.W.
Washington, D.C. 20080

Miss Laurie M. Streeter
Associate Solicitor
N-2716 New Labor Building
U.S. Department of Labor
Washington, D.C. 20210

Jack Garrell
US DOL/ESA/OWCP
U.S. Department of Labor
1717 K Street, N.W.
Washington, D.C. 20211

Judge David W. Pelkey
Office of Administrative Law Judges
U.S. Department of Labor
Vanguard Building, Suite 720
Washington, D.C. 20036

APPENDIX E

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of:	)	
HALLEY I. THOMAS Claimant	)	Case No. 76-DCWC-4
v.	)	OWCP No. 40-89630
WASHINGTON GAS LIGHT COMPANY Employer	)	
SELF-INSURED	)	

JAMES F. GREEN, ESQ.
Ashcraft, Gerel and Koonz
925 15th Street, N.W.
Washington, D.C.
For the Claimant

PAUL H. HARRINGTON, ESQ.
1100 H Street, N.W.
Washington, D.C. 20080
For the Employer

Before: DAVID W. PELKEY
Administrative Law Judge

DECISION AND ORDER

As a consequence of Claimant's request for compensation for permanent total disability, a hearing was held on August 7, 1975. At that hearing, the parties made record stipulations of facts and issues, testimony of Claimant and his wife was given, and each party introduced two exhibits into the record. The parties submitted that they did not then propose to tender medical evidence as to the nature and extent of Claimant's injury. Rather, they requested a resolution of Employer's challenge to jurisdiction based on the full faith and credit clause of the United States Constitution (Article IV, Section 1). They proposed that, should there be a finding of jurisdiction under the District of Columbia Workmen's Compensation Act (36 D.C.C. 501, *et seq),* medical reports would then be incorporated in the records for evaluation.

On September 24, 1975, an Interlocutory Decision and Order issued holding that, under the full faith and credit clause of the United States Constitution, the compensation award made to Claimant under the Virginia Compensation Act is not *res judicata* to the extent that it precludes a subsequent award of compensation under the District of Columbia Compensation Act.

By this reference thereto, the September 24, 1975, Interlocutory Decision and Order is incorporated herein as though fully set forth herein.

On January 16, 1976, the administrative law judge was advised that the parties elected to have no further hearings relating to the merits of the claim and that they proposed to have a decision on the merits based on the then record, as supplemented by documentation to be submitted.

Accordingly, three issues are to be adjudicated herein:

A)Whether, as a result of his January 22, 1971, injury and under District Law, Claimant suffered permanent and total incapacity to earn the wages he was receiving, at the time of the injury, in the same or any other employment.

B)Whether, Employer not having filed the report required by 33 U.S.c. 930(a), 330 U.S.C. 930(f) has tolled the running of the period set forth in 33 U.S.C. 913(a) for filing a claim for compensation so as to render Claimant's September 1974 claim timely for his January 1971 injury.

C)Whether, if an award is payable under District law, Employer should be charged with payment of additional 10 percent amounts under 33 U.S.C. 914(e), interest, costs, and attorney's fee.

Statement of the Case

On February 17, 1976, the administrative law judge received medical reports from Claimant's attorney representing joint submissions by the parties. On the basis of the date of the first, or only, submission by each doctor, the essential substance of each report is set forth hereafter.

A Dr. Henesy reported that a January 22, 1971, X-ray examination of Claimant revealed no evidence of injury or disease of the lumbosacral spine.

A January 23, 1971, report was the first of 16 reports submitted by Dr. Cooney, a neurological surgeon. It reflected a history given by Claimant that referenced the January 22, 1971, injury. Reportedly, Claimant complained, chiefly, of acute back pain; additionally, there was a report of mild back discomfort. As a result of his examination, the doctor was of the impression that an acute lumbosacral strain had been experienced. He recommended traction, physical therapy and medication.

On February 18, 1971, the doctor noted Claimant's failure to respond to conservative therapy, performance of a myelogram that revealed protrusion to the left of an L4 central disc, February 8 disc surgery, and discharge to be followed as an outpatient.

A March 5, 1971, report was occasioned by Claimant's development of discomfort in the low back and left hip. Examination revealed limited motion in the lumbosacral

spine and muscle spasms. Claimant was considered yet to be "temporarily totally disabled." Home use of analgesics, muscle relaxants and moist heat was prescribed.

On April 15, 1971, the doctor noted Claimant's rehospitalization on March 9, traction treatment, myelogram revelation of defect at L4-L5 level, nerve root decompression on March 26, and discharge, free of pain, to be followed as an outpatient. Final diagnosis; ruptured disc at L-4.

An April 23, 1971, report reflected improvement but occasional discomfort in the low back and leg. Noting that Claimant was still totally disabled and recovering from surgery, the doctor recommended medication, when necessary, and another visit in one month.

A month later, May 21, Claimant's complaints were reported as unchanged. He was found still to be symptomatic following surgery. Longer use of a back support, rest and medication were recommended for the then still totally disabled patient.

A July 14, 1971, report noted June 2 hospitalization for persistent left leg pain, tests resulting in a consensus among four physicians that Claimant had neuritis, July 3 discharge for home rest and mild analgesics, and contemplated surgery absent lessening of symptoms.

On August 4, 1971, the doctor reported Claimant's rehospitalization on July 12 because of "the intractable nature of his left leg pain", July 22 surgery that included a sensory rhizotomy of the L5 root and spinal fusion, August 31 discharge without leg pain, and, while still totally disabled, future observation as an outpatient.

A September 1, 1971, document indicated that Claimant was "recovering nicely from his complicated case," that he was given medication to facilitate sleep, and that another visit was scheduled for follow-up one month later.

On October 11, 1971, the doctor acknowledged Claimant's complaints of occasional pains in the low back and left leg, and noted advice that Claimant "avoid sitting as much as possible" and return in one month.

Claimant was reported, on November 8, 1971, to be do-

ing "fairly well" while complaining of occasional low back and left leg pains and expressing anxiety to return to some form of work. More than three months having passed since surgery, the doctor opined that he could perform light duty and return for examination in six weeks.

On December 6, 1971, the doctor noted development of severe pain behind the left knee and mild low back pains. Because Claimant had not yet returned to work, a 10-day medication program was scheduled to precede a determination of his ability to return to "light duty."

A January 12, 1972, report reflected Claimant's ability to work but " a few days" because of persistent pain behind the left knee, continued total disability, prescription of medication, and a scheduled evaluation one month later.

Claimant's condition on March 8, 1972, was essentially unchanged. The persistent sciatica was attributed to adhesions about the nerve root which, the doctor opined, might require a long time to subside. Although total disability remained, no need was seen for further studies.

Approximately 10 months later, on January 12, 1973, the doctor noted that Claimant's left leg pain had persisted and that mild low back pain had recently reappeared. He submitted that Claimant had "significant" residuals of his ruptured disc and assessed a 35 percent permanent disability.

On November 7, 1975, the doctor noted that Claimant had been seen by a Dr. Rizzoli and that the patient reported an inability to work because of back and leg discomfort. He again assessed a 35 percent permanent partial disability attributable to residuals of the ruptured disc.

A Dr. Harrell submitted a May 28, 1971, report to the Industrial Commission of Virginia. It referenced the January 22 accident; diagnosed acute lumbosacral strain and a ruptured disc at L4-L5; and recommended treatment by traction, physical therapy, medication, hospitalization and operation. The report indicated that the physician had seen Claimant on the day of the accident. The doctor also submitted an August 8, 1971, report in which he referenced surgical procedures on February 8 and March 26, 1971, and indicated the possibility of future surgery. He submitted that it was questionable that Claimant would again be "a useful employee in the T&D Department."

One Dr. Collins submitted a January 18, 1972, report reflecting a July 13, 1971, examination of Claimant following two surgical experiences. An examination resulted in a finding of recurrent nerve root irritation and flexion contracture of the left knee. He recommended spinal fusion of L4 to the sacrum. Office visits on August 31, October 8, November 5, and December 17, 1971, followed the recommended surgery. On the date of the last visit Claimant was no longer reporting back pain, but he continued to report occasional pain around the left thigh that was concentrated at the back of the left knee. The doctor recommended reduced use of the back brace Claimant had worn since the surgery.

A Dr. Rizzoli, a neurological surgeon, submitted the first of five reports on February 6, 1973. At that time, Claimant complained of low back and left leg pain. After an examination, the doctor had the impression that Claimant had residuals of ruptured lumbar disc disease. He recommended electrical studies of and physiotherapy to the left leg along with spine studies. He foresaw possible need for another myelogram. By a February 20 addendum to the report, he opined that Claimant had a 50 percent permanent partial disability.

The doctor's second report, on March 22, 1973, noted hospitalization between February 27 and March 22, 1973. During that time, surgery was discussed but not recommended. Conservative treatment was given and recommended for the future with a review of the condition after one month. At that time, the doctor believed that Claimant was unable to return to work.

A third report, dated April 23, 1973, revealed unchanged complaints. The doctor noted improvement in that a right leg problem, one that was considered during hospitalization, had disappeared. However, he still did not feel Claimant could return to work.

The doctor's September 25, 1973, report reflected unchanged complaints. After examination, he felt that further surgery was not then indicated. He recommended medication to facilitate sleep.

The surgeon's last report was dated June 11, 1974, and noted unchanged complaints. The doctor recommended against further surgery. He recommended pain and sleep medication. He reported having advised Claimant to seek occupational rehabilitation and "another form of employment."

A Dr. Chiu forwarded Dr. Rizzoli a February 13, 1973, report of a February 9 examination oriented to rehahilitation. On the basis of partial denervation at L5-S1 root and chronic irritation of an adjacent root, the doctor proposed a program of physical therapy and reevaluation after two weeks.

A February 26, 1975, examination of Claimant by a Dr. Smith was the basis of a report reflecting complaints of progressively severe pain in the low back and left leg. After examination, the doctor felt that Claimant exhibited residuals from lumbasr disc disease and multiple surgical procedures. He saw no indication of a need for further surgical procedures, but recommended analgesics and physical therapy. The doctor concluded his report with the statement that Claimant "will reconsult this office as need be for his symptoms."

The last report made of record was the January 9, 1976, report of Dr. Schuster, an orthopedic surgeon. It was based on a December 22, 1975, examination, prior to which Claimant complained, chiefly, of pain in his low back that radiated down the left leg. A history of a January 1970 injury was recited that paralleled Claimant's history after his January 1971 injury. On the basis of his examination, the doctor diagnosed residual instability of the spine and residual sciatic radiculitis on the left side. The orthopedist opined that the back problem began with the "injury of January 1970" and that Claimant then (January 1976) did not have solid fusion in the spine. He found Claimant to be unable to perform" any type of heavy manual labor"

and he assessed a permanent 50 percent partial disability of the body as a result of the spinal problem. He forecasted a need for additional surgery to reexplore involved areas and to reinforce the spinal fusion.

Discussion

Medical documentation submitted by the parties is considered to be sufficiently substantial to support the determination that, as a result of the January 22, 1971, injury, Claimant has suffered a permanent and total loss of capacity to earn the wages he was receiving at the time of the injury.

When examined in connection with other medical evidence of record, Dr. Henesy's finding is considered to be of no persuasive value.

Dr. Cooney's reports through October 11, 1971, are read as depicting a total disability under the Act. His November 8, 1971 report suggests a condition that will tolerate "light" duty, but succeeding reports through March 8, 1972, again reflect total disability. The reports of January 1973 and November 1975 make no reference to ability to work, but reflect a medical disability rated at 35 percent. In view of the fact that the reports reflect that, between January 1971 and November 1975, Claimant experienced disability in spite of extensive medical care and treatment, it is considered reasonable to conclude that, medically, the disability is permanent in nature.

As early as August 1971, Dr. Harrell, a professional who is acquainted with Claimant's job requirements, questioned Claimant's future ability to resume the job requirements performed at the time of the injury.

Dr. Collins' January 1972 opinion that Claimant's recovery progress required monitoring is not read as one recognizing a capacity to perform hard manual labor.

In February 1973, Dr. Rizzoli found a permanent medical disability rated at 50 percent. In June 1974, he recommended occupational rehabilitation and an attempt

to find another "form" of employment. Such is interpreted as being reflective of an opinion that Claimant was then permanently without capacity to perform work such as he performed for Employer at the time of the injury.

Dr. Chiu's opinion that there was need for physical therapy attending a nerve condition is not considered to be one reflecting a capacity for manual labor.

The report of Dr. Smith, an associate of Dr. Rizzoli, is read as reflecting a condition that is not subject to medical or surgical correction. It is reflective of the presence of a disability that Claimant will have to experience with hope, at best, of alleviation of symptoms of discomfort.

Dr. Schuster's January 1976 opinion that, medically, Claimant has a 50 percent permanent disability that may require future surgery is read as decriptive of a condition that will not accommodate hard manual labor.

Furthermore, testimony at the hearing, uncompromised and minimally challenged, reflects a condition of permanent total disability under the Act. Observation of the Claimant during the hearing buttresses the testimony.

All of the foregoing has been evaluated in connection with the following propositions:

A) A finding of permanent disability is not precluded by a medical prognosis that an employee is likely, at some indefinitive future date, to get better and to be able to return to work *(Watson* v. *Gulf Stevedore Corp.*, 400 F.2d 649 (CA5, 1968).

B)Disability should be evaluated in economic, rather than in medical, terms *(Owens* v. *Traynor,* 274 F. Supp. 770; affirmed 396 F.2d 783; certiorari denied 89 S. Ct. 401, 393 U.S. 962, 21 L. Ed. 2d 375.

C) Under the Act, the ability to earn is the test of the right to compensation *(United Engineering Co.* v. *Pillsbury,* 92 F. Supp. 898; affirmed 187 F.2d 987; affirmed 72 S.Ct. 223, 342 U.S. 197, 96. L.Ed. 225).

In connection with all of the foregoing it is concluded that, as a result of the January 22, 1971, injury, Claimant has permanently and totally lost the capacity to earn the wages he was receiving, at the time of the injury, in

employment by Employer or in any other employment.

The record reveals that, in spite of the fact that Claimant sustained injury on January 22, 1971, his September 25, 1974, filing of his claim under the Act was timely. Employer did not address the matter on brief. Claimant, on brief, accurately submitted that Employer had knowledge of the injury on the date it was sustained and that, on the date of the hearing, had not filed the report required to be filed by 3 U.S.C. 930(a). Too, Claimant accurately submitted that, whereas 33 U.S.C. 913(a) bars a claim unless it is filed within one year after an injury, 33 U.S.C. 930(f) provides that the one year period of limitation does not begin to run against the claim until the report required by 33 U.S.C. 930(a) has been filed. The record supports the conclusion that the one year statute of limitation had not begun to run on September 25, 1974.

The record does not contain sufficient evidence to enable the administrative law judge to determine whether the additional 10 percent payment required under 33 U.S.C. 914(e) must be applied to the first, or any succeeding, installment payment made by Employer. Consideration of 33 U.S.C 914(b) and (e) reveals that Employer should have made the first installment payment by February 19, 1971. The date of first payment or any succeeding payment does not appear of record. The record only reflects that as of February 5, 1971, Employer and Claimant executed a written agreement that compensation under the Virginia statute would be paid from January 30, 1971.

On brief, Claimant accurately submitted that Employer filed no notice of controversion complying with the requirements of 33 U.S.C. 914(d). Additionally, the record contains no evidence that Employer sought excuse for untimely payment(s) on the basis that timely payment of any installment could not be made because of conditions over which Employer had no control.

Accordingly, the administrative law judge can but determine that, as to any installment of compensation, payable without award, that was not paid when due, Employer is

obligated pay Claimant an additional amount equal to 10 percent of the amount of any such installment.

On February 17, 1976, the administrative law judge received Claimant's petition requesting award of attorney's fee. In the petition, Claimant's attorney submitted that he has represented Claimant since July 1973. For the purpose of determining the amount of the fee to be awarded, the submission is not accepted. Documentation submitted by Claimant indicates that the attorney/client relationship attached to this claim on or about September 24, 1974. For this reason, and because the attorney's specifications of services rendered are identified neither by dates nor time frames, much is left to be desired in the form of assistance to the administrative law judge during his evaluation of the petition.

Counsel solicited consideration of the knowledge and experience of his firm in effecting an award of a fee. Such has been considered, and recognition has been accorded the proposition that the claim presents an uncomplicated factual situation. The foregoing, coupled with the background and experience of the administrative law judge, have rendered certain elements of the fee petition unacceptable. Commitments of time for purposes listed below are determined to be excessive.

A) 14 hours for client interviews and preparation for hearings. Reasonably, such could have been accomplished in 9 hours.

B) 18.5 hours for consultations with representatives of Employer and the Department of Labor. Reasonably, such could have been accomplished in 8 hours.

C) 37 hours for research. No more than 24 hours (3 days) were reasonably required to research matters involved herein.

D) 2.5 hours to prepare and submit final documentation. The product submitted reasonably required no more than an hour.

Accordingly, allowance of a fee for 46.5 hours of services rendered Claimant herein, at the hourly value counsel placed on his services, is determined to be

reasonable. Award of a fee totalling $1,860.00 is hereby made and approved.

Finding Of Fact

As a result of the January 22, 1971, injury, Claimant has permanently and totally lost the capacity to earn the wages he was receiving, at the time of the injury, in employment by Employer or in any other employment.

Conclusion of Law

As a result of the January 22, 1971, injury and since that date, Claimant has been rendered permanently and totally disabled.

Decision

As a result of a January 22, 1971, injury, Employer is obligated to pay Claimant compensation for permanent total disability from January 23, 1971.

The claim is not barred because of Claimant's failure to file his claim within one year of January 22, 1971.

As to any installment of compensation, payable without an award, that was not paid when due, Employer is obligated to pay Claimant an additional amount equal to 10 percent of the amount of any such installment.

Order

That Employer pay Claimant compensation for permanent total disability, beginning January 23, 1971, based on average weekly wages totalling $114.67.

That Employer deduct, from amounts due and payable under this Decision and Order, any amounts paid to Claimant, for the January 22, 1971, injury, under the Virginia Compensation Act.

That, as to any installment of compensation that was required to be, but was not paid within 14 days after it became due, Employer pay Claimant an additional amount equal to 10 percent of any such installment.

That, as to any installment not paid when due, Employer pay Claimant interest an annual rate of 6 percent until date of payment.

That Employer pay James F. Green, Esq., $1,860.00 for services rendered Claimant herein.

David W. Pelkey
Administrative Law Judge

Dated: March 4, 1976
Washington, D.C.

CERTIFICATE OF FILING AND SERVICE

I certify that on *March 5, 1976* the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, *District of Columbia* District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:
Mr. Halley I. Thomas, 1508 Howard Road, S.E., Washington, D.C. 20020
Claimant

Washington Gas Light Company, 1100 "H" Street, N.W. Washington, D.C. 20005
Insurance Carrier or Employer (if self-insured)
James F. Green, Esq., Ashcraft, Gerel and Koonz, 925 - 15th Street, N.W. Wash., D.C.
Paul H. Harrington, Esq., 1100 "H" Street, N.W. Washington, D.C. 20080

A copy was also mailed by regular mail to the following:

Judge *David W. Pelkey,* Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20210
Associate Solicitor of Labor for Employee Benefits, U.S. Department of Labor, Suite

N-2716, NDOL, Washington, D.C. 20210
Director, Office of Workers' Compensation Programs, (LHWCA) U.S. Department of Labor, Washington, D.C. 20211

JACK GARRELL
Deputy Commissioner
40th Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs.

Form LS–19
Rev. Aug. 1975

APPENDIX F

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Washington, D.C. 20210

In the Matter of:	:	
HALLEY I. THOMAS *Claimant*	:	
	:	Case No. 76-DCWC-4
v.	:	OWCP No. 40-89630
WASHINGTON GAS LIGHT COMPANY *Employer*	:	
SELF-INSURED	:	

JAMES F. GREEN, ESQ.
Ashcraft, Gerel and Koonz
925 15th Street, N.W.
Washington, D.C.
For the Employer

PAUL H. HARRINGTON, ESQ.
1100 H Street, N.W
Washington, D.C. 20080
For the Employer

Before: DAVID W. PELKEY
Administrative Law Judge

INTERLOCUTORY DECISION AND ORDER

Claimant seeks compensation for permanent total disability from January 21, 1971, additional 10 percent payments under 33 U.S.C. 914[e], fees and costs under 33 U.S.C. 928, and 6 percent interest on unpaid installments of compensation, under the Longshoremen's and Harbor

workers' Compensation Act, as amended, 33 U.S.C. 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, as amended, 36 D.C.C. 501 *et seq.* Hereafter, those acts are cited as the Act. This Decision and Order follows an August 7, 1975, hearing that was conducted in accordance with 5 U.S.C. 554. At that hearing, the parties represented that they had reached agreements as to issues to be adjudicated and as to facts to be taken as admitted. Those agreements, framed as stipulations, follow:

Stipulation of Issues to be Adjudicated

Whether, under the full faith and credit clause of the United States Constitution (Art. IV, Sec. 1), the compensation award made to Claimant under the Virginia Compensation Act is *res judicata* to the extent that it precludes a subsequent award of compensation under the District of Columbia (District) Compensation Act.

Whether, as a result of his January 22, 1971, injury and under District Law, Claimant suffered permanent and total incapacity to earn the wages he was receiving, at the time of the injury, in the same or any other employment.

Whether, Employer not having filed the report required by 33 U.S.C. 930(a), 33 U.S.C. 930(f) has tolled the running of the period set forth in 33 U.S.C. 913(a) for filing of a claim for compensation so as to render Claimant's September 1974 claim timely for his January 1971 injury.

Whether, if an award is payable under District law, Employer should be charged with payment of additional 10 percent amounts under 33 U.S.C. 914(e), interest, costs, and attorney's fee.

Stipulation of Facts to be taken as Admitted

Claimant's January 22, 1971, injury arose out of and in the course of his employment by Employer.

On January 22, 1971, an employer/employee relationship existed between the parties.

At the time of injury, Claimant's average weekly wages was $114.67.

But for the period from December 27, 1971, through January 3, 1972, Employer has paid and continues to pay compensation for total disability under the Virginia Compensation Act since the date of the injury.

Employer has paid $57 for physical therapy treatments given to Claimant since the injury.

At the opening of the hearing, the parties submitted that they did not then propose to tender medical evidence as to the nature and extent of Claimant's injury. They expressed the desire that the administrative law judge, initially, issue a Decision and Order resolving Employer's full faith and credit/ *res judicata* challenge to jurisdiction under District law. They stipulated that, if there be a finding of District jurisdiction, all treating physicians' reports will be introduced into the record. Additionally, they stipulated that Claimant has the right to get a medical report and evaluation from an "independent" physician to be selected by Claimant and that Employer has the right to submit observations on such report and evaluation. The procedural plans were adopted by the administrative law judge.

Statement of the Case

Claimant was the first witness. He stated that he was 32 years old, married, the father of one child, possessor of an 11th grade education, and a resident of the District since 1949. The witness said that Employer's main office is in the District and that he was employed by Employer at its District employment office in January 1970. He represented that he began employment as a custodian (building cleaner), a job similar to one he had held in the past, but one for which he had no other training. At the time of his injury, he had become one of Employer's laborers, and was involved in repair of pipes Employer placed in streets. For such work, he had no special training; it required use of jackhammers, picks and shovels. Prior to his injury, approximately 60 percent of his work had been in the District, 20 percent had been in Virginia and 20 percent in Maryland.

The witness testified that, on the day of the injury, he had been working in Virginia, out of a Virginia office of Employer, for approximately two months. During that period, he was paid by checks drawn on a District bank and he could be, and was, recalled from time to time to work in the District. (Employer stipulated that Claimant could be "fired" by the Employer's District office while he was assigned to work in Virginia).

Claimant said that, the day he was injured, he was using 35-pound and 95-pound jackhammers to break concrete. He bent over while using a 35-pound hammer and was unable to straighten up. His foreman was called and he was taken to the District where he was examined by Employer's nurse and sent to a physician selected by Employer. On that same day, Claimant was hospitalized.

Successively, he was operated on for a ruptured disc, released to go home after approximately 28 days, hospitalized for surgery to remove disc fragments, released, hospitalized without surgery, released, hospitalized for a third operation, released, and hospitalized for a fifth time without surgery in May 1973. During those experiences, and successively, he was attended by three physicians. He has been under care of the third physician since the last hospitalization, on a need-for-relief-from-pain basis, and last visited that doctor's office in April 1975. He has also had a short period of physical therapy treatment that was paid for by Employer.

Claimant represented that he has experienced pain in the back area at regular and frequent intervals since the injury. As of the date of the hearing, he indicated, he was unable to sit for a long period of time, to maintain one position for a long period, to be flat on his back, or to lie on his stomach. He said that his doctor has told him not to drive a car, mow a lawn or lift more than 11 pounds.

He said that from December 27, 1971 through January 3, 1972, as a result of Employer's offer, he performed filing duties in one of Employer's offices. Pain prevented him from doing the sitting and bending required for such work and, on the latter date, Employer's nurse sent him home. He has not worked since January 3, 1972. Since that date, Employer has offered him no work and he has sought no other work. He submitted that he has sought no work because of his physical condition. He proposed that he did not know what work he can do and that, if Employer would not hire him, no employer would hire him. He expressed the belief that his health has rendered him unemployable. Claimant noted that Employer has paid disability compensation under Virginia Law (but for the short period he worked) since the injury and that he now receives total disability compensation under the Social Security program.

Claimant's wife testified that Claimant has appeared never to be free of pain since the injury. She noted that his condition limits his capacity to work around the house and to engage in physical activity with his child. She stated that she has observed no indication that time has resulted in a reduction of severity or frequency of pain experienced by her husband.

Each party made documentation part of the record. Claimant's exhibits were: A) a copy of a September 24, 1974, notice, to the Department of Labor, of a claim for benefits, under the District Compensation Act, arising out of a January 20, 1971, injury in Arlington, Va; and B) a copy of an October 2, 1974, letter from the Department of Labor to Employer suggesting that the injury was covered by the Act and asking Employer's opinion relative thereto. Employer's exhibits were: A) a copy of a February 5, 1971, Memorandum of Agreement as to Payment of Compensation, signed by Claimant and Employer, covering compensation payments under the Virginia Workmen's Compensation Law, and B) a copy of a March 15, 1971, Industrial Commission of Virginia Award approving the referenced agreement.

Discussion

On brief, Employer challenged jurisdiction by discussing the following propositions: A) whether, under the full faith and credit clause, the Virginia compensation award bars an additional award under District law; and B) whether, by its terms, the Virginia compensation statute precludes a District award after an award has been made under the Virginia Statute. Employer acknowledged that, but for the Virginia award, the instant claim would be cognizable under District law.

A lesser portion of the brief was devoted to the first proposition. In connection therewith, Employer submitted that Claimant's Virginia award had become final. By reason thereof, the full faith and credit concept precluded District assumption of jurisdiction to enter another award. In support of the position, Employer cited so much of *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 64 S. Ct. 208 (December 20, 1943), as indicated that an employee, seeking a compensation award in a second state after having received a prior award in another state, may be faced with a full faith and credit consideration.

A larger portion of the brief was devoted to the second proposition. In connection therewith, Employer submitted that the language of the Virginia statute and Virginia Court decisions indicate, in the statute, a "clear intent" to preclude subsequent recovery of benefits in another jurisdiction after receipt of compensation under the Virginia statute.

Employer referenced so much of Section 65.1-40 of the Virginia law as provides that rights granted under the statute, when accepted, "shall exclude all other rights and remedies xxx at common law or otherwise." The language of the provision was said to be "all inclusive" and, because Employer found no Virginia Court decision

limiting the effect of the language, its "plain meaning" (as expressed by Employer) should control in a determination of legislative intent. The representation that there is a "plain meaning" of the language is unpersuasive. Extensive litigation involving similar statutory provisions, coupled with Employer's failure, to ascribe a meaning to the language by Virginia courts, persuasively indicates that the language has no "plain meaning." The quoted statutory language reasonably can be read to relate to the exclusion of all other rights under Virginia common law and to the exclusion of all other remedies otherwise provided by Virginia statutes.

Employer submitted that the "other rights" excluded by the statute include the right to seek the award sought by Claimant under District law. The submission is not supported by the *Magnolia* statement that a state is without power to give extraterritorial effect to its laws. Too, absent convincing evidence to the contrary, such "other rights" reasonably can be read to relate to rights under Virginia law. Finally, absent a convincing legislative statement of such intent, no justification appears for reading the collective mind of the Virginia legislature as having intended to enact a law that has the extraterritorial effect of depriving another state of jurisdiction over a matter in which the other state has a legitimate interested.

Employer submitted that "or otherwise" refers to rights not previously existing under the common law, and would include the right to receive compensation benefits under the law of a jurisdiction other than Virginia. Here, again, Employer adopted the extraterritorial posture referenced earlier. Reasonably, in the phrase "at common law or otherwise," the latter two words are readable as applying to a Virginia statutory enactment such as a wrongful death statute.

Employer cited *Griffith v. Raven Red Ash Coal Co.*, 179 Va. 790, 20 S.E.2 530 (1942), and *Humphries v. Boxley*

Bros., Co., 146 Va. 91, 135 S.E. 890 (1926), to support its position that the Virginia statute was designed to exclude an award in another state after an award is made in Virginia. Examinations of those decisions reveal that they dealt with Virginia's compensation law *vis-a-vis* the Virginia common law action for damages; those decisions were not concerned with an extraterritorial thrust of the statute. Accordingly, they are not considered to be appropriate for application to the instant situation.

Employer cited *Industrial Commission of Wisconsin v. McCartin*, 330 U.S. 622, 67 S.Ct. 886 (March 31, 1947), for the proposition that only unmistakable language in one state's statute should be construed as precluding compensation proceedings under another state's statute and proposes that the language in the Virginia statute is so unmistakable.

On brief, Claimant also addressed the full faith and credit concept from award and statutory language approaches. Relative to the Virginia award, Claimant submitted that, were it recognized as a bar to a District award, violence would be done to the ruling in *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 67 S. Ct. 801 (March 10, 1947). The submission is rejected. No award was involved in *Cardillo*. Claimant also submittred, without elaboration, that, as a supplement to the Virginia award, a District award would not violate the concept if amounts paid under the Virginia award were credited to Employer under a District award.

In addressing the exclusive character of the language of the Virginia statute, Claimant cites the *McCartin* requirement of unmistakable language by a state legislature to support the exclusion of an additional award in another jurisdiction. Claimant submits that the language in the Virginia statute is comparable to the statutory language involved in *McCartin*. The language in *McCartin* was not found to be so exlcusive as to

preclude an additional award. Claimant proposes that the Virginia language is not so exclusive as to preclude an additional award under District law.

Disposition of the jurisdictional challenge dictates consideration of the full faith and credit clause (U.S. Const., Art. IV., Sec. 1) and a statute implementing the clause. In pertinent part, Article IV provides that each state shall give full faith and credit to the public acts, records, and judicial proceedings of every other state. 28 United States Code 687 provides, in pertinent part, that every court in the United States must give such faith and credit to a state's act, record or judicial proceeding as is given that act, record or judicial proceeding (by law or usage) by the courts of the state in which the act, record or judicial proceeding was taken.

That compensation awards have been treated as judgments, for purposes of *res judicata,* is established by court treatment of such awards. In *Magnolia,* the court found that, under Texas law, a compensation award that has become final is entitled to the same faith and credit as a judgment of a court, In *McCartin,* the court found that, under Illinois law, a compensation award is *res judicata* on matters adjudicated and agreed upon therein. For purposes of *res judicata,* a United States District Court has treated an award under Virginia law as a judgment (*Perrin v. Brunswick Corp.*, D.C., W. D. Va., November 5, 1971, 333 F. Supp. 221). The U.S. Supreme Court treated the Virginia compensation law in *Dillard v. Virginia Industrial Commission,* 416 U.S. 783, May 15, 1974, and held, *inter alia,* that: A) if an award is not timely challenged, it is conclusive until changed by the Commission; and B) in a ministerial capacity, a Virginia court will enforce an award. Accordingly, it is concluded that, in the instant matter, Claimant's award under the Virginia compensation law must be given such faith and credit in the District as it is given in Virginia; that, to the extent that the Virginia award is *res judicata* in Virginia, it is *res judicata* in the District.

Employer proposes that *Magnolia* supports the submission that, because there was *an* award under Virginia law that was coupled with payment and acceptance of payment thereunder, the full faith and credit clause bars *any* award under District law; that, as *res judicata,* the terms of the *specific* Virginia award bars *any* award under the District law. Such a proposal is acceptable if the Virginia award precluded any further award under Virginia law. If the Virginia award did not preclude a further award of compensation in Virginia, the proposal is not acceptable.

The decision in *Magnolia* supports the imposition of the conditions placed upon the acceptability of Employer's proposal. In controlling part, *Magnolia* held that, to the extent that the Texas award was *res judicata* in Texas, it was *res judicata* in Louisiana. The court found that: A) by its terms, the Texas award (constituting "full compensation for his injury") was a conclusive determination, betwen the parties, that the employer should be liable to the employee, relative to the injury, for no more than the amount of the Texas award; B) under Texas award and law, the employee was precluded from receiving any compension in Texas that exceeded the amount of the award; C) because the Texas award was a bar to any further recovery of compensation in Texas, it was under the full faith and credit concept, a bar to the further remedy under Louisiana law; and D) Louisiana was without power to deny that the Texas award had the same binding effect on the parties in Louisiana as it had on the parties in Texas. Significantly, the essence of the *Magnolia* decision is read to be that, because *the* terms of *the* Texas award precluded further compensation in Texas, they precluded further compensation in Louisiana. Significantly, there is an absence of a holding that, becuase there had been *an* award in Texas, *a* further award in Louisiana was precluded.

Claimant submits that *Magnolia* does not support Employer's proposal because the ruling therein was

distinguished in the Surpeme Court's ruling in *McCartin* by the finding that the *McCartin* clause did not specifically preclude recovery in other jurisdictions. Claimant submits that the *Magnolia* clause was found to be so exclusive.

In *McCartin,* as similarly in *Magnolia,* the court held that, to the extent that the Illinois award was *res judicata* in Illinois, it was *res judicata* in Wisconsin. The court found that: A) by its terms, the Illinois award determined the total amount the employer was required to pay the employee under the Illinois compensation law; B) by its terms, the Illinois award did not affect any rights that the employee may have had under Wisconsin law C) the actions of the Illinois Industrial Commissioner in approving an agreement and effecting the award containing a reservation of right under Wisconsin law, reflected the fact that, under Illinois law, a *McCartin-type* award did not preclude an additional award under the law of another state; and D) rather than having been intended as conclusive of all rights to compensation arising out of the injury, the award was determinative of compensation payable under Illinois law and not determinative of compensation subsequently payable under Wisconsin law. Significantly, the essence of the *McCartin* decision is read to be that, because *the* terms of *the* Illinois award recognized and preserved the employee's right to pursue a subsequent remedy under Wisconsin law and did not preclude attempts to obtain further compensation under Wisconsin law, the award was not *res judicata* as to any amount of compensation that might be payable for the injury under Wisconsin law. The court found that the award was *res judicata* only as to the amount the employer had to pay the employee under Illinois law. The court noted that it found nothing in Illinois law or decisions under it that was designed to preclude recovery in Wisconsin.

On the basis of the foregoing, it is concluded that *Mc-*

Cartin and *Magnolia* reflect the court's application of one legal principle to two factual situations.

Attention is now directed to consideration of the extent to which Claimant's March 15, 1971, Virginia award is *res judicata* in Virginia. By its terms, the award required payments, as follows:

A) During "incapacity," payments at a $62 weekly rate, beginning January 30,1971.

B) *If* the incapacity exceeded six weeks, Claimant was to be paid such amounts "as *may be* awarded" (underscoring supplied) for partial incapacity of any members of the body except those covered by the "schedule loss" provisions of the compensation law. (The payments, subject to a set minimum amount, were to be based on Claimant's average weekly wages before his injury and the wages he was able to earn after the injury; they were not to exceed $62 weekly for 500 weeks).

C) In addition, if the partial incapacity involved members covered by the schedule loss provisions of the statute, Claimant was to be paid the dollar amounts for the time periods specified by those provisions and the state commission was to be so advised.

D) Further in addition, if total incapacity, as distinguished from total and permanent incapacity, exceeded six weeks, Claimant was to be paid (subject to express minimum and maximum amounts) a stated percent of his average weekly wages for not longer than a specified number of weeks. For total and permanent incapacity (statutorily defined as loss of both hands, arms, feet, legs, eyes, or any two thereof, total paralysis, or brain injury resulting in incurable imbecility or insanity, such payments were to be made without limitation as to time, with advice to the commission.

An examination and evaluation of the terms of the Virginia award are determined to be supportive of the conclusion that it was in the nature of an "open end" award. It effected definitive and specific provision for payment of compensation only if the initial incapacity

lasted six weeks and it covered only those six weeks. It was designed to provide for such periods and natures of incapacity that might mature and to pay compensation only during the period(s) that Claimant might be involuntarily unemployed due to injury. The award did not effect a final settlement of the rights and liabilities of the parties. Rather, by its terms, it contemplated further awards.

Further, Virginia Supreme Court of Appeals held, in *Griffith v. Raven Red Ash Coal Co.*, 20 S.E.2 530, June 8, 1942, that an essential of *res judicata* is that the issue raised in a second suit must be identical with the issue, or one of the issues, raised and determined in the first suit. In the instant matter, the issue is whether Claimant is entitled to compensation for permanent total disability under District law. In the Virginia compensation proceeding, the issue was whether Claimant was entitled to compensation for what was then to be determined as no more than a temporary total disability. The issues are not considered to be identical.

Still further, Virginia courts have indicated that, after an award and during the whole compensation period applicable to the injury in question, the relation of the Virginia Commission to the award is that of a court to a judgment during the term at which it was rendered. (*American Mutual Liability Insurance Co. v. Hamilton,* 135 S.E. 21, 145 Va. 391 (1926); *Old Dominion Land Co. v. Messick,* 141 S.E. 132, 149 Va. 330 (1928). The propositon that a judgment is not a final determination until the end of "term time" is so widely accepted as to render citation of support thereof unnecessary.

Yet still further, a ruling by a court in Wisconsin, a pioneer state in workmen's compensation legislation, is persuasive. In *Spietz v. Industrial Commission,* S.Ct. Wis, 28 N.W.2 354, 251 Wis. 168 (July 1, 1947), a Wisconsin resident was given a Montana award of $17 per week, for not to exceed 300 weeks, for temporary total disability; payments were to continue if there be permanent partial

disability. Subsequently, an award was made under Wisconsin law. The court held that the award was not final as to partial disability, if any, when the temporary total disability terminated. The Montana award was not *res judicata* so as to preclude the Wisconsin award. The concept stated in *Spietz* is adopted herein.

In view of the foregoing, it is determined that, because the Virginia award was not a bar to further recovery of compensation in Virginia, it was not, under the full faith and credit concept, *res judicata* as a bar to further recovery of compensation under District law.

Employer submits that the provision in the Virginia compenstion statute that makes an employee's rights thereunder exlusive of all others, "at common law or otherwise," precludes assumption of jurisdiction under District law. The submission is deemed to be inconsistent with an interpretation, by the Supreme Court of Appeals of Virginia, that the purpose of the exclusive remedy section is to exclude the common law remedies of an employee under Virginia law (*Griffith v. Red Raven Ash Coal Co.,* June 8, 1942, 20 S.E.2 530; *Fauver v. Bell,* June 18, 1951, 65 S.E.2 575).

Further, that court has variously stated that the Virginia law was enacted for the beneficent purpose of attaining a humanitarian end which had hitherto been frustrated by the inexorable rules of the common law (*A. Wilson and Co. v. Matthews,* March 10, 1938, 195 S.E. 490); that, because the purpose of the law was to protect the employee, it should be construed liberally in his favor (*Ellis v. Commonwealth of Virginia,* January 24, 1944, 28 S.E.2 730); and that the purpose of the law is to provide compensation to a workman for the loss of his opportunity to engage in work *(Burlington Mills Corp. v. Hagood,* February 24, 1941, 13 S.E.2 291).

In *McCann v. Newport News Shipbuilding and Dry Dock Co.,* D.C., E.D. Va., October 22, 1959, 177 F. Supp. 909, the court indicated that an award by another state would not preclude jurisdiction under the Virginia law.

More generally, a court has held that, in workmen's compensation case, the state where an injury occurred or the state where the employment contract was made can apply its own law without violation of the federal full faith and credit clause (*Romero v. Ten Eyck - Shaw, Inc.*, CA Nev. 1968, 400 F.2d 81, cert. den. 89 S.Ct. 629, 393 U.S. 1021, 21 L. Ed. 2 566).

Recognition of the stated humane purposes of the Virginia statute, the emphasis on an employee's welfare, the mandate for liberal construction in an employee's favor, and the concept that the Virginia law was designed as a substitute for common law remedies is deemed to be supportive of the determination that the exclusive provisions of the Virginia statute related to common law and other remedies under Virginia law and were not designed for extraterritorial extension to other sovereign jurisdictions. They do not preclude jurisdiction under District law.

Such a posture is consistent with the propositions that the relief available for permanent total disability under District law is unavailable under Virginia law; that the lesser amounts payable under Virginia law are less advantageous to Claimant than are the larger amounts payable under District policy as expressed in the Act; and that Claimant's execution of the Virginia agreement while hospitalized for surgery is not persuasively reflective of his exercise of an intelligent election of the Virginia remedy in preference to the District remedy.

Findings of Fact

1) On January 22, 1971:

A) Claimant was a resident of the Districtof Columbia.

B) Claimant was an employee of Employer, having entered into an employment contract in the District of Columbia during calendar 1970.

C) Employer was doing business, through employees, in the District of Columbia.

D) Claimant sustained an injury while performing duties for Emplover in Arlington, Virginia.

2) On February 5, 1971, Claimant and Employer executed an Industrial Commission of Virginia Memorandum of Agreeent as to Payment of Compensation, pursuant to which Claimant ws to receive compensation at the rate of $62 per week from and including January 30, 1971, until terminated in accordance with the provisions of the Workmen's Compensation Law of the State of Virginia.

3) On March 15, 1971, the Industrial Commission of Virginia issued an Award — Approval of Agreement approving the memorandum of agreement and entering an award of compensation to Claimant, as follows: $62 per week, during incapacity, payable weekly, beginning January 30, 1971; medical benefits awarded for the full statutory period. The award contemplated contingencies and changes set forth in Sections 65.1-54, 65.1-55, 65.1-56, and 65.1-62 of the Virginia compensation law.

4) Payments have been and are being paid and accepted under the award.

5) On October 2, 1974, Office of Worker's Compensation Programs, U.S. Department of Labor, acknowledged receipt of Claimant's September 24, 1974, claim for compensation (for the 1971 injury) under the District of Columbia Workmen's Compensation Act.

Conclusions of Law

1) Claimant is an employee within the meaning of the District compensation act.

2) Employer is an employer within the meaning of the District compensation act.

3) Claimant sustained an injury on January 22, 1971, that falls within the jurisdiction of the Distirct compensation law.

4) A U.S. Department of Labor administrative law judge has jurisdiction to make an award under the Act to Claimant, if the merits of the claim are supportive thereof, for a disability attributable to the January 22, 1971, injury.

Decision

Under the full faith and credit clause of the United States Constitution (Art. IV, Sec. 1), the compensation award made to Claimant under the Virginia Compensation Act is not *res judicata* to the extent that it precludes a subsequent award of compensation under the District of Columbia Compensation Act.

Order

That Claimant and Employer submit medical documentation to the administrative law judge within 30 calendar days after receipt of this Decision and Order.

That Claimant and Employer contact each other and the administrative law judge within 10 calendar days after receipt of this Decision and Order to establish a date for the continuation of hearings in this matter.

/s/ David W. Pelkey
David W. Pelkey
Administrative Law Judge

Dated: September 24, 1975
Washington, D.C.